88-1908

SUPREME COURT, U.S.
FILED
APR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

JOYCE M. COVATTO,

Petitioner,

v.

UNITED STATES,

Respondent.

WRIT OF CERTIORARI
TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Joyce M. Covatto
1545 West 38th Street
Post Office Box 3368
Erie, PA 16508
(814) 868-4821

Pro Se

63

QUESTIONS PRESENTED FOR REVIEW

1. Did the prosecutor's disregard of specific instructions from the trial court regarding the scope of examination of a witness for the government constitute grounds for a mistrial?

2. Did the prosecutor's misstatement of evidence and other misconduct at trial prevent the Petitioner from receiving a fair trial, and did the Court of Appeals properly analyze the extent of the prejudice to the Petitioner?

3. Did the trial court err in permitting the government to introduce unfairly prejudicial evidence pertaining to matters which were not alleged in the indictment and which occurred after the events for which the Petitioner was being tried?

4. Did the Court of Appeals err in ruling that the government produced sufficient evidence to support the convictions of the Petitioner?

LIST OF PARTIES

The Petitioner's co-defendant below, Alfred D. Covatto, has filed a separate petition for certiorari in this Court. The docket number of his case is 88-1757.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List of Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	5
Argument	
I. The Petitioner Was Denied A Fair Trial When The Trial Judge Refused To Declare A Mistrial After The Prosecutor Disobeyed the Trial Judge And Elicited A Highly Prejudicial Answer From A Government Witness	18
II. The Petitioner Was Denied A Fair Trial By The Prosecutor's Misconduct	22

TABLE OF CONTENTS CONTINUED

Page

III. The Trial Court Erred In Permitting The Introduction Of Unfairly Prejudicial Evidence 34

IV. The Government Produced Insufficient Evidence To Prove That The Petitioner Violated 18 U.S.C. §§ 656 and 1344 40

Conclusion 56

TABLE OF AUTHORITIES

Cases — Page

Berger v. United States, 295 U.S. 78 (1935) 18, 19, 23

Burks v. United States, 437 U.S. 1 (1978) 40

Carr-Consolidated Biscuit Co. v. Moore, 125 F. Supp. 423 (M.D. Pa. 1954) . . . 51

Friedberg v. United States, 348 U.S. 142 (1955) 21

Havener v. United States, 15 F.2d 503 (8th Cir. 1926) 38, 39

Jackson v. United States, 443 U.S. 307 (1979) 40

Morisette v. United States, 342 U.S. 246 (1952) 54

National Bancorporation and First United National Bank v. Covatto 43, 47

Singer v. United States, 380 U.S. 24 (1965) 19

TABLE OF AUTHORITIES CONTINUED

Cases	Page
Smith v. Phillips, 455 U.S. 209 (1982)	19
Taylor v. Kentucky, 436 U.S. 478 (1978)	54
United States v. Daniels, 528 F.2d 705 (6th Cir. 1975)	26
United States v. Matters, 244 F. 736 (8th Cir. 1917)	37, 38
United States v. Ruse, 112 F. Supp. 667 (W.D. Pa. 1953)	39
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	19
United States v. Southers, 583 F.2d 1302 (11th Cir. 1978)	21
United States v. Young, 470 U.S. 1 (1985)	19

Statutes	
18 U.S.C. § 656	39, 40
18 U.S.C. § 1344	40, 54
Fed. R. Evid. 401	35
Fed. R. Evid. 403	35, 36, 39

OPINIONS BELOW

The Petitioner's convictions in a trial by jury were affirmed by the Third Circuit Court of Appeals in an unpublished opinion issued on January 26, 1989, which is set forth in the Appendix at A-1. The Petitioner's Petition for Rehearing In Banc was denied without a written opinion (A-24).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The decision of the Third Circuit to deny the Petition for Rehearing In Banc was issued on February 21, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the fifth amendment to the United States Constitution states in pertinent part: "No person shall . . . be deprived of life, liberty, or prop-

erty, without due process of law[.]"

18 U.S.C. § 656 states:

Theft, embezzlement, or misapplication by bank officer or employee

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> As used in this section, the term "national bank" is synonymous with "national banking associa-

tion"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U.S.C. § 1344 states:

Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or

insured financial institution" means--

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

18 U.S.C. § 2 states:

> **Principals**
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

The Petitioner, Joyce M. Covatto, was indicted along with her husband, Alfred D. Covatto, by a federal grand jury in the Western District of Pennsylvania in April 1987. The indictment charged violations of 18 U.S.C. §§ 656, 1344, and 2 in 49 counts. The Covattos' first trial ended in a mistrial because the jury could not reach a unanimous verdict. The second trial, which took place

in June of 1988, resulted in guilty verdicts on the 37 charges against Joyce Covatto and on 44 of the 49 counts charged to Alfred Covatto. Alfred Covatto was found not guilty on four counts; one count had been dismissed prior to trial.

The Covattos were put on trial because of certain events which took place after the purchase of National Bancorporation (NBC) by a bank known initially as First National Bank of Fryburg and later renamed First United National Bank (FUNB). NBC was a corporation, founded by Alfred Covatto, which marketed and serviced bank services, such as loans and credit card accounts, for major banks in Pennsylvania and elsewhere. Testimony at trial indicated that because of NBC's success and promising future, it was the object of several purchase attempts beginning in 1982

when Richard Dowling sought to buy NBC on behalf of a group of investors from Titusville, Pennsylvania. Later, in January of 1984, Dowling negotiated the buy-out of NBC on behalf of FUNB, of which he was then chief executive officer.

Alfred and Joyce Covatto were key figures in the operation of NBC both before and after its purchase by FUNB. Prior to the sales, Mr. Covatto was a controlling stockholder in NBC and was its CEO, and he remained the CEO after the purchase. Joyce Covatto was at all pertinent times the head of the telemarketing division of NBC.

In the indictment and at trial, the government alleged three basic areas of criminal activity on the part of the Covattos. First, the government charged that Mr. Covatto fraudulently took 11 checks from various NBC

accounts for his personal use without having any valid authority to do so. Second, the government alleged that Mr. Covatto authorized the provision of child care for the Covatto children, so that Joyce Covatto could continue working at NBC, without the permission of the FUNB board of directors. Third, the government claimed that the Covattos issued, or caused the issuance of, false and fraudulent invoices to Marine Midland Bank, for work which was never authorized, and thereby obtained money from FUNB. Joyce Covatto was accused of aiding and abetting her husband in these crimes.

The government's testimony at trial was all circumstantial with regard to the allegations of fraud; no witness testified to the effect that he or she had direct knowledge of any fraudulent scheme on the part of the Co-

vattos. Instead, the government introduced evidence concerning the circumstances of the various transactions at issue and invited the jury to infer the intent to defraud from these circumstances. The Covattos, on the other hand, denied any fraudulent intent and relied on the defense of good faith, arguing that the withdrawal of funds by checks and the child care payments were all done with no attempt to conceal them and were in fact valid payments of accrued compensation and employee benefits, respectively. With regard to the invoice question, the Covattos testified as to the likely basis for the invoices and explained that they were unable to provide direct documentation of the charges when asked because of an inability to research files which were in the custody of FUNB and were later presumably destroyed.

The government's evidence on the allegations relating to the child care benefits consisted mainly of testimony from Kim Mallon, the person who took care of the children, to the effect that she was on the NBC payroll and that on certain occasions she had conversations with Mr. or Mrs. Covatto in which they made statements which implied that Mallon was listed on the payroll of NBC as something other than a babysitter. The prosecution also introduced testimony from an FUNB director who stated that he was unaware of the child care benefits.

The Covattos, on the other hand, demonstrated through testimony from several witnesses, including Richard Dowling, that Joyce Covatto was an extremely valuable employee who was essential to the success of NBC. Moreover, the evidence showed that the child

care benefit had been authorized by Alfred Covatto and provided to Joyce Covatto with the knowledge and blessing of the NBC directors prior to the sale of NBC, and had merely continued thereafter as a valid employee benefit offered within the discretion of the CEO of NBC.

With regard to the allegedly fraudulent withdrawals from NBC accounts by checks, the undisputed evidence at trial showed that at the time of the purchase of NBC, Alfred Covatto had accrued $48,000 of compensation from NBC which he had not yet taken. This accrued compensation was acknowledged in the buy-sell agreement and in statements made by Dowling to Covatto. Indeed, at the time of the closing on the sale, Covatto was paid $10,000 against this accrued compensation, and it was acknowledged that the remainder

would be owed in the future. The government alleged in its case that in April of 1984 Covatto voluntarily and unequivocally gave up his right to the remaining $38,000 in a meeting with the FUNB board of directors. However, the government's own evidence demonstrated that the board took no official action on this alleged unilateral promise and gave no consideration to Covatto for it. Covatto and numerous other witnesses testified, on the other hand, that Covatto merely offered to postpone collection of the funds owed to him as an indication of how much he wanted to make the venture a success. Covatto and others further testified that in a later meeting in May of 1984, after portions of the purchase agreement were not adhered to by FUNB, Covatto clearly indicated that he would begin drawing against his ac-

crued compensation as the funds became available.

To prove the misappropriation of funds, the government introduced 11 checks drawn on NBC accounts which were made out to Alfred Covatto. An important element of the government's case against the Covattos was the introduction of highly prejudicial evidence relating to allegations that Alfred Covatto had withdrawn the money in order to pay off an influential employee of Marine Midland Bank in order to maintain NBC's contracts with the bank. This evidence took the form of lengthy testimony from a variety of witnesses who had no knowledge of, or information regarding, the withdrawal of the funds by Covatto. Moreover, Covatto freely admitted taking the checks, indicating that he believed that he was entitled to the funds

as payments of his accrued compensation. Supporting this position was a document introduced into evidence, indicating a contemporaneous accounting of these payments in the books of NBC.

Finally, with regard to the three invoices, the government relied primarily on evidence that the invoices had never been paid by Marine Midland Bank and that supporting documentation for the invoices had not been provided by the Covattos. The invoices had been paid by FUNB under a system by which NBC was immediately reimbursed for its invoices, after which FUNB would be paid by Marine Midland. The government introduced no evidence which established that the Covattos had personally prepared the invoices or had received any benefit from the payments.

Evidence introduced by the Covattos showed that the reimbursement system underlying the invoice problem was created by Richard Dowling, the CEO of FUNB, as a means of improving cash flow for NBC because Marine Midland Bank had been too slow in paying its bills in the past. In addition, the Covattos demonstrated that the first invoice in question was for an advance on a large telemarketing project, and therefore would not have had any supporting documentation since the work had not yet been performed at the time of the invoice. With regard to the two other invoices at issue, the Covattos presented evidence describing which projects were covered by the invoices and describing how all efforts to reconstruct the supporting documentation for the invoices was made impossible by the unavailability of the per-

tinent records, which were in the custody of FUNB.

In short, the Covattos maintained that they had done nothing with the intent to defraud FUNB, and that the criminal prosecution was initiated by Richard Dowling after Alfred Covatto refused to resign and refused to sign an agreement containing a noncompetition clause and a promise not to sue FUNB. Only after these developments did Dowling attempt to find something that the Covattos did criminally and call on the FBI for assistance in his personal dispute with the Covattos.

At trial, the Assistant United States Attorney who prosecuted the case against the Covattos engaged in numerous incidents of prosecutorial misconduct. At one point, he disregarded the plain ruling of the trial judge regarding the proper scope of question-

ing of a government witness and asked a question which the trial judge had explicitly directed him not to ask. In addition, the prosecutor made many material misstatements of evidence in his arguments to the jury and overemphasized unduly prejudicial evidence throughout the trial.

The Third Circuit declined to reverse the convictions of the Covattos. Despite acknowledging that the prosecutor's conduct was "not praiseworthy," the court ruled that the misconduct was not sufficiently prejudicial to require reversal. The court also ruled that there was sufficient evidence to support the convictions and that the trial court had not erred in admitting the evidence pertaining to the uses of the funds taken in the checks by Alfred Covatto.

ARGUMENT

I. THE PETITIONER WAS DENIED A FAIR TRIAL WHEN THE TRIAL JUDGE REFUSED TO DECLARE A MISTRIAL AFTER THE PROSECUTOR DISOBEYED THE TRIAL JUDGE AND ELICITED A HIGHLY PREJUDICIAL ANSWER FROM A GOVERNMENT WITNESS.

The standards to which a United States Attorney must adhere in the prosecution of criminal cases have been clearly delineated by the Supreme Court. In the case of Berger v. United States, 295 U.S. 78, 88 (1935), this Court described the duty of a government prosecutor in these words: "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Relying on this principle, the Court in Berger reversed the defendant's conviction because of the cumula-

tive effect of the prosecutor's continual and persistent misstatement of evidence and improper questioning of witnesses.

Since the ruling in Berger, the Court has reaffirmed its principles in numerous cases. See United States v. Young, 470 U.S. 1 (1985); Smith v. Phillips, 455 U.S. 209 (1982); Singer v. United States, 380 U.S. 24 (1965); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). By now it should be clear that a government prosecutor must be scrupulously careful in his trial conduct so as to insure that he meets his "obligation . . . that justice be done." Berger v. United States, supra, 295 U.S. at 88.

In this case, the prosecutor most clearly did not live up to the standard of conduct which is required of him. The most egregious example of his misconduct occurred in the

course of the presentation of the government's evidence, when the prosecutor was questioning David Hammaker, a bank examiner with the Comptroller of the Currency. The trial court had ruled that Hammaker could be questioned about the approval by his office of the purchase of NBC by FUNB and about the business relationship of the two entities, but the court explicitly told the prosecutor not to ask any questions regarding whether he had referred any investigation of NBC or FUNB to the criminal authorities. Despite this ruling, the prosecutor almost immediately asked: "Without going into a lot of detail, would it be fair to say that based upon your examination, you referred the matter to the authorities?" (Tr. at 536.) Defense counsel for both Joyce and Alfred Covatto immediately moved for a mistrial on the grounds of preju-

dice and disobeying of the judge's ruling. However, after taking the motions under advisement overnight, the court denied them.

The clear import of the improper question was that the Comptroller of the Currency believed that the Covattos had committed a criminal offense. Such a conclusion was clearly irrelevant to the prosecution of the Covattos and was highly prejudicial, as it improperly indicated some official belief in the Covattos' guilt. It is well settled that witnesses may not testify as to their belief on the ultimate issue of guilt or innocence of defendant Friedberg v. United States, 348 U.S. 142 (1955); United States v. Southers, 583 F.2d 1302 (11th Cir. 1978) (in prosecution of bank officer for misappropriation of bank funds, bank officials were properly denied permission to give their opinion of

the question of the defendant's intent to defraud).

Therefore, the trial court's denial of the motion for mistrial denied the Covattos a fair trial in two respects: first, the question unfairly permitted the jury to infer that the Comptroller of the Currency believed the Covattos to be guilty of a crime, and second, the prosecutor's action was so contrary to his duty of fair play and justice as to require reversal.

II. THE PETITIONER WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S MISCONDUCT.

In addition to the prosecutor's disobeying the plain ruling of the trial court, as discussed in part I of this Petition, the trial of the Covattos was permeated with flagrant misstatements of evidence and improper

arguments by the prosecutor. The character and sheer magnitude of these misstatements and improper arguments requires a finding that the Covattos were denied a fair trial.

In Berger v. United States, supra, this Court reversed a conviction in a case in which the Court characterized the prosecutor's misconduct as "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." 295 U.S. at 89. A comparison of what occurred in Berger with what took place at the Covattos' trial necessitates the conclusion that this Court must exercise its jurisdiction to reverse the Covatto's convictions.

As in Berger, "[i]t is impossible . . . without reading the testimony at some length, and thereby obtaining a knowledge of the set-

ting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct [of the prosecutor]." Id. at 85. However, a number of examples indicate the nature of the misstatements and improper argument of the prosecuting attorney.

Perhaps the most blatant example occurred in the closing argument of the prosecutor at a point when he was trying to attack the credibility of the Covattos' testimony. The prosecutor went on at great length about how Joyce Covatto attempted to mislead the jury, and that in the course of doing so she exaggerated the size of the business done by NBC:

> Joyce said that she was involved in the Prime Diamond project and they were going to do 15,000 accounts per day. I wrote that down, and I thought, 15,000 accounts per day, if I'm right in my math, and I think that I am, because I have checked it twice, 15,000 accounts

> per day adds up to $97,000 per day generated at $6.50 per hour. If you take that one step further, even if they ran this for one year, they would make $35,597,000.
>
> Now that is typical of what both Covattos have done in this case when they go up onto the stand and they testified. They found whatever way they could, instead of answering the question, to divert or excuse or type or make it sound like this was a huge operation, and who could possibly question a meager $151,000.

(Tr. at 1207-08.) In fact, in her testimony Joyce Covatto had never used the figure of 15,000 per day, but had on two occasions described how they would generate 1,500 new credit card accounts per day in a large telemarketing program (Tr. at 962; 969-70).

Thus, not only did the prosecutor intentionally misstate the evidence, he did so in a manner which was designed to maximize the prejudicial nature of the misstatement, by emphasizing that he had written the figure

down and that he had made the mathematical calculations which purported to show the lack of credibility of Joyce Covatto. Surely, the prosecutor oversteps the bounds of proper argument when he injects his personal beliefs as to the credibility of witnesses into his arguments before the jury. United States v. Daniels, 528 F.2d 705 (6th Cir. 1975) (it is improper for prosecuting attorney in a criminal case to state his personal opinion concerning credibility of witness).

Another example of the unfairness of the prosecutor was when he stated to the jury in closing argument that NBC was a "struggling business" and that Alfred Covatto was "looking for somebody to buy him out." (Tr. at 1121.) This claim fit in with the government's argument throughout the case that Covatto was a slick operator from the big

city (Erie) who took advantage of the small-town folks from FUNB (Tr. at 125). To accentuate this line of argument, the prosecutor twisted the uncontested testimony at trial, which was that Richard Dowling had approached Covatto on two separate occasions and initiated discussions for the purpose of buying NBC because of its promising future.

Yet another example of blatant mischaracterization of testimony occurred when the prosecutor discussed the evidence pertaining to the allegedly fraudulent invoices. A key government witness, James Manzella, an employee of Marine Midland Bank, testified on direct examination that he knew of advances paid by the bank to NBC, but that certain invoices had not been paid. He specifically stated, however, that he did not speak with either Mr. or Mrs. Covatto regarding those

invoices:

> Q: Did you ever have occasion to speak to either Mr. Covatto or Miss [sic] Covatto regarding these three invoices that I have put before you?
>
> A: I can't recall if I ever had conversations regarding those invoices.

(Tr. at 500-01.) In closing argument, however, the prosecutor flatly stated to the jury that "Joyce told Manzella, the guy from Marine Midland Bank, that this $60,000 invoice was perfectly legitimate and that she would talk to Al and they would get back to him." (Tr. at 1125.) This rendition of the evidence more suited the prosecution theory that the Covattos' guilt on these charges was evidenced by their failure to produce documentation as promised, but there was nothing in the testimony at trial to support it. Joyce Covatto testified only that she had

spoken with Mr. Manzella on one occasion in November 1984 when he had told her that Marine Midland was not going to be honoring any more advances. In other words, the prosecutor simply fabricated the testimony which he summed up for the jury.

In addition to these and other misstatements of evidence, the prosecutor unfairly introduced voluminous evidence pertaining to allegedly criminal acts of Alfred Covatto which had no bearing on the charges brought before the jury. As is discussed below, the admission of any evidence relating to the uses to which Alfred Covatto put the funds taken as accrued compensation was unfairly prejudicial. Compounding this unfairness was the fact that the prosecutor overemphasized this evidence, to the extent of bringing in witnesses who had no knowledge of the events

which formed the basis of the indictment solely to buttress allegations of bribery by Alfred Covatto.

For example, in his opening argument the prosecutor stated at length that the evidence would tend to show that Mr. Covatto used money from the allegedly misapplied funds to bribe James Willman at Marine Midland Bank into continuing that bank's working relationship with NBC. He then spent literally hours of the trial questioning various witnesses about the relationship between Willman and Covatto, with the obvious intent of using this testimony to depict Covatto as a bad person.

Just as damaging was the prosecutor's continued success at side bar conferences in speaking so loudly regarding his theory of commercial bribery that the jury clearly

overheard. For example, in making his offer of proof regarding David Kuczkowski, an employee of Marine Midland who had no connection to the charges against the Covattos, the prosecutor on several occasions was warned against speaking so the jury could overhear him, but he continued to do so:

> MR. BARBIN: Your Honor, this gentleman will testify that he was employed with Marine Midland Bank[.]
>
> THE COURT: Not so loud. I can hear you good.
>
> MR. BARBIN: . . . . He will testify that he worked directly under James Willman, that in the fall of '83 he accompanied Mr. Willman down to Erie to meet with Mr. Covatto, at which time they obtained a quote from Mr. Covatto that the services they were offering for their telemarketing was $6.50. He will testify that at the same time . . . he received a quote of $3.50 from CPM Research Industries[.]
>
> THE COURT: Not so loud. I can hear you.

. . . .

MR. BARBIN: . . . . The reason why there has to be this greasing the wheels for Mr. Willman and his daughter is because there was a substantial disparity between $3.50 per account generated and $6.50 per account generated.

. . . .

THE COURT: I think we're having trouble with side bars.

MR. CORBETT: Could you whisper?

(Tr. at 479-86.) Although the trial judge ultimately sustained an objection to any testimony regarding competing bids, the damaging statements quoted above--plus numerous other prejudicial comments too lengthy to quote completely--were heard by the jury. Later, during a side bar on the defendants' motion to dismiss, the prosecutor again was cautioned to speak more softly after he was told that his words could be heard "pretty clearly" at the jury box (Tr. at 560-61). In his

closing argument, the prosecutor repeatedly emphasized the uses to which Covatto put the funds taken against his accrued compensation. The net effect of the persistent references to irrelevant material and the insinuations to be drawn from it was that the jury was likely to convict Covatto as much for what he did with the funds which he took as for whether he had taken them without authority. That this undoubtedly occurred is proven by the fact that the jury did in fact acquit Covatto on all but one of the counts relating to checks made out to him, but convicted him on all of the counts involving checks made to others. Since the sole legal issue on these charges was Covatto's entitlement to the funds--and not what he did with them--this Court must conclude that the prosecutor's repeated references to the bribery theory did

in fact prejudice the Covattos.

III. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF UNFAIRLY PREJUDICIAL EVIDENCE.

Apparently because of the weak case against the Covattos, the government's strategy at trial was to introduce as much prejudicial testimony as possible against the Covattos, whether or not it was relevant to the charges in the indictment. As part of this strategy, the prosecutor put before the jury, over the objection of the Covattos, numerous witnesses and lengthy testimony regarding allegations of corporate bribery against Alfred Covatto. The purported basis for the admission of such evidence was the demonstration of motive for the taking of the funds represented by 11 checks drawn against NBC accounts. However, Alfred Covatto at all

times freely admitted taking the funds in question for the purpose of drawing against his accrued compensation. Thus, whether Covatto took the money was not at issue in the trial; the sole question to be resolved by the jury was, as was stated by the court in its instruction to the jury, whether Covatto reasonably believed that he was entitled to accrued compensation in the amounts alleged in the indictment. Clearly, the ultimate uses of funds could have no bearing on the issue of whether they were taken with fraudulent intent.

Therefore, the Covattos' trial was tainted by the cumulative effect of this highly and unduly prejudicial evidence. The trial court's decision to permit the admission of such evidence violated the letter and spirit of Fed. R. Evid. 401 and 403. Rule

401 describes relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It is apparent that the allegations of corporate bribery were so unrelated to the charges of misapplication of funds as to be irrelevant to the prosecution on those charges.

Moreover, even if it is assumed that the evidence was tangentially relevant, Rule 403 mandates the conclusion that it should have been excluded. Rule 403 states in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]

The ruling of the Third Circuit below that the contested evidence was not unfairly prejudicial was in direct conflict with the ruling of the Eighth Circuit in United States v. Matters, 244 F. 736 (8th Cir. 1917). In Matters, the defendant was alleged to have aided and abetted a bank president in the misapplication of funds by convincing him to issue a certificate of deposit payable to Mary E. Johnson for no consideration. At trial, the government introduced evidence for the purpose of showing that the defendant owed Johnson a personal debt. Johnson was called to testify and over the objection of the defendant, was permitted to give narrative testimony regarding her financial dealings with the defendant which indicated that the defendant had defrauded her of money. The prosecutor argued on appeal that this

evidence was relevant to the issue of the defendant's intent in securing the misapplication of funds, but the court of appeals disagreed:

> Matters was not on trial for defrauding or attempting to defraud a widow of the life insurance money of her husband, and we think it was clearly prejudicial error to allow the whole transaction between the witness Mary E. Johnson and Matters to be investigated.

Id. at 738-39. Even if the relationship between the defendant and Johnson was relevant to the charges, the court concluded,

> it did not justify the admission in evidence of the whole history of the transaction between Mary E. Johnson and Matters. The primary effect of the evidence was to show that Matters had attempted to defraud Mrs. Johnson out of her money. The effect, if any, of the evidence upon the real issue in the case being tried was so incidental and small that it would be lost, so far as the jury is concerned, in the presence of those features of the testimony to which we have adverted. The introduction of the

> evidence in our judgment prevented a fair trial.

Id. at 739 (emphasis added). Accord Havener v. United States, 15 F.2d 503 (8th Cir. 1926); see also United States v. Ruse, 112 F. Supp. 667 (W.D. Pa. 1953) (in prosecution for violation of 18 U.S.C. § 656, what defendant did with funds is immaterial).

These cases, together with the general principles set out in Fed. R. Evid. 403, make it clear that in this case the Covattos were heavily prejudiced by the introduction of evidence regarding transactions and disbursements of funds to third parties. Because the jury's verdict clearly demonstrated the effect of this unfairly prejudicial evidence, this Court should exercise its jurisdiction and set aside the convictions.

IV. THE GOVERNMENT PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT THE PETITIONER VIOLATED 18 U.S.C. §§ 656 AND 1344.

The portion of the Court of Appeals opinion which addressed the sufficiency of the evidence against the Covattos demonstrates that the court did not make a careful review of the evidence at trial. Both 18 U.S.C. §§ 656 and 1344 require an intent to defraud, and it was the existence of this intent which was the central issue of the Covattos' trial. However, a review of the trial transcript demonstrates that there was not substantial evidence, viewed in a light most favorable to the government, to uphold the jury's verdict of guilt. Jackson v. United States, 443 U.S. 307 (1979); Burks v. United States, 437 U.S. 1 (1978).

First, with regard to the charges relating to the provision of child care for Joyce Covatto, the government's evidence showed only that an employee benefit which had been given prior to the sale of NBC was continued in exactly the same manner after the sale. The uncontested evidence showed that prior to the sale of NBC, Alfred Covatto was its CEO, with full power to set salaries and grant employee benefits. Uncontroverted evidence also showed that prior to the acquisition of NBC by FUNB, Joyce Covatto was the driving force behind the marketing system of NBC, and that the marketing operation was a prime reason for FUNB's interest in purchasing NBC. Demonstrating this is the fact that at the time of the buy-out, FUNB purchased a $500,000 key-man insurance policy for Mrs. Covatto.

The evidence demonstrated that the purpose for the child care benefit when it was first granted was to enable Mrs. Covatto to continue working after the birth of a child. Although she initially attempted to bring the baby to work, this proved unworkable, and eventually the need for full-time assistance with child care was recognized. Testimony at trial clearly established that the NBC board of directors was aware of the benefit and approved of it.

After the sale of NBC to FUNB, the benefit continued as before. Mrs. Covatto continued to be a valuable employee, but received only $24,000 in salary, and was one of the only NBC officers who did not receive an increase in base salary at the time of the sale. The child care benefit was one reason for her low salary. The evidence also demon-

strated that Alfred Covatto continued as CEO of NBC after its sale with the same duties, responsibilities, and discretion as before.

This latter fact is also compelled by a state court decision which was rendered after the trial but during the pendency of the appeal before the Court of Appeals. In the case of National Bancorporation and First United National Bank v. Covatto, No. 670-A-1986, slip op. (Ct. Common Pleas, Erie County, Nov. 9, 1988) (A-26), a civil suit arising out of a dispute between Covatto and FUNB over his authority to execute a lease agreement for his use of an automobile without notifying, and seeking approval from, the FUNB board of directors, the court concluded:

> Covatto's position as an employee of the newly acquired entity substantially parallels that of his executive status at the original National Bancorporation. The duties and powers exercised in each

> of the two employment situations involved substantial control over ordinary and everyday business operations to the point that ultimate decisions concerning everyday business were within Covatto's control.
>
> Covatto himself could, therefore, execute any function that was within the lawful power of the board of directors subject only to the "ordinary course of business" standard. See, Renault v. L.N. Renault and Sons, 188 F.2d 317 (3d Cir. 1951)[.]
>
> The fact that Covatto was given almost unrestrained control over this facet of the entire business operation by the Board of Directors from the moment of the acquisition of [NBC] by [FUNB] further requires the legal result that he must have assumed any and all powers with which the Board could have endowed him.

Id. at 4-5 (emphasis added).

Testimony at trial also indicated that Kim Mallin, the person who took care of the Covatto children, was carried on the payroll in precisely the same manner after the sale

of NBC as she was before the sale.

Plainly, the provision of this child care benefit to a valued and needed employee by a CEO with complete authority and discretion in employee matters was not exceptional and was not criminal. The foundation of the government's case for criminality and fraud was the testimony of Mallin, who related certain off-hand comments allegedly made by the Covattos concerning how she was carried on the payroll. First, Mallin stated at trial that at one point in 1984, she had asked Mr. Covatto show she was listed on the payroll and he responded that she was a "domestic investigator." This exchange was obviously intended to imply to the jury that Mallin was being let in on a scheme, but such a meaning or inference was completely rebutted by other more direct and more relevant

testimony of Mallin when she was asked point-blank if the Covattos had ever asked her to cover up the fact that she was being paid to take care of the Covatto children, and she responded that Mrs. Covatto had never asked her to lie or disguise her status, and that Mr. Covatto had never said anything to indicate that she had any reason to hide her status and in fact, when she was initially questioned by the FBI, he had urged her to tell the truth.

Other evidence introduced by the government included an application by Mallin for a Mastercharge Card which supposedly demonstrated a fictional job classification for Mallin. However, the government's own witnesses provided testimony which proved that the application was made in 1983, prior to the buy-out, and that Carolyn Januleski, the

individual who processed the application and a subsequent credit line increase--and who thus would have been the only individual to have been the object of any possible deceit in the matter--was well aware of Mallin's job and the source of her paycheck.

The government also attempted to prove fraud by showing that certain directors of FUNB were unaware of the benefit. This was clearly irrelevant, however, given the power and authority of Alfred Covatto to set salaries and benefits. See National Bancorporation and First United National Bank v. Covatto, supra. The fact that FUNB directors or officers were unaware of the child care payments had no bearing on the case in the absence of evidence that the Covattos affirmatively misrepresented to the directors and officers that no child care payments were

being made. The government introduced no evidence of such misrepresentations, nor were any such false statements ever made. Although the government introduced and attempted to make much of the sale agreement, which contained a boiler plate provision to the effect that it contained the sole agreement of the parties, such a provision would in no way limit the inherent powers of the CEO within the generally accepted scope of operations and within the realm of employee relations and benefits. Id.

Based on the evidence presented by the government, it is apparent that the jury's verdict was not supported by substantial evidence sufficient to prove guilt beyond a reasonable doubt. Instead of proving a fraudulent attempt to harm FUNB, the government showed only that Alfred Covatto wisely re-

tained the services of Joyce Covatto so as to continue the economic growth of NBC both before and after its sale to NBC.

The evidence on the other allegations was equally insufficient. The government's case on the allegations of misappropriation of funds represented by the checks drawn on NBC accounts depended on the claim that Alfred Covatto voluntarily and unilaterally gave up his right to $38,000 in accrued compensation after the sale of NBC to FUNB, and that he could not have reasonably believed that he was entitled to this accrued compensation when he took the checks. However, the evidence introduced at trial showed conclusively that no such relinquishment of the accrued compensation had occurred. This was proven by stipulated evidence at trial that on the day after the supposed relinquishment,

Covatto submitted a personal financial statement to the Comptroller of Currency which listed $38,000 as an asset and identified it as accrued compensation. Moreover, even if statements made by Covatto could have been construed to indicate a willingness to forego his accrued compensation, the evidence was uncontested that he later clearly communicated to the FUNB CEO that he was going to begin withdrawing funds to satisfy his accrued compensation. Significantly, the government offered no evidence to rebut this point. The validity of Covatto's withdrawal of the funds at issue was further corroborated at trial by documentary evidence showing contemporaneous accounting of the withdrawals. Official NBC corporate records maintained by Pat Robbins, the bookkeeper for NBC, showed the withdrawals in the precise

amounts and on the correct dates. The government produced no evidence to explain why Covatto would have kept an official accounting of his accrued compensation on the books of NBC if he believed that he was not entitled to the money.

In light of the uncontested testimony that Dowling, the CEO of FUNB, was aware of Covatto's accrued compensation claims and that the accounting of the claims was reflected on the business records of the bank, it is not reasonable to argue that Covatto was in any manner concealing the payments from the bank. A corporation is presumed to have not only the actual knowledge of its officers but also the information which is reflected on the books and records of the corporation. Carr-Consolidated Biscuit Co. v. Moore, 125 F. Supp. 423, 432 (M.D. Pa.

1954). If Covatto, who in good faith believed that he was entitled to take the funds as they became available in the accounts of NBC, took the money without specific notice to anyone at FUNB, he cannot thereby be inferred to have had criminal intent, particularly since as CEO of NBC he had the inherent authority to cause the checks to be made.

The bulk of the government's evidence on these charges consisted of testimony regarding what Covatto did with the withdrawals as he took them. Not only was this prejudicial evidence erroneously admitted (see Argument III, supra), its lack of relevance rendered it insubstantial evidence with regard to charges at issue. Again, the allegations against Covatto required proof of the fraudulent intent to take money to which he was not

entitled. What became of the money could have no relevance to whether the money was lawfully taken, and any testimony regarding such disbursements could not be considered substantial evidence of fraudulent intent.

Finally, as to the government's proof regarding the allegedly fraudulent invoices, the evidence introduced by the government consisted of copies of the invoices, together with testimony of witnesses from Marine Midland and FUNB to the effect that they were uncertain as to what work the invoices referred. The government also relied heavily on testimony from witnesses who stated that the Covattos did not supply adequate documentation for the invoices when asked, thus raising the inference that the Covattos were covering up something regarding the invoices. However, the government presented no witness

who testified that Marine Midland never ordered or authorized the services covered by the invoices. Moreover, the inferences which were raised by the failure of the Covattos to provide documentation were more than adequately rebutted by the testimony of witnesses who clarified that at the time the invoices were questioned and documentation was requested the Covattos no longer had access to the necessary records. Thus, a crucial element of 18 U.S.C. § 1344--a scheme to defraud--was never proven by substantial evidence.

Because the government bears the burden of proof with regard to the elements of the crime, it is well established that a defendant has no obligation to provide the prosecution with proof of his innocence. Taylor v. Kentucky, 436 U.S. 478 (1978); Morisette

v. United States, 342 U.S. 246 (1952). Accordingly, the Covattos, even if they had been in a position to do so, were under no duty to prove their innocence by searching out necessary documentation to support the invoices. Thus, the government's chief proof with regard to the invoices--the failure of the Covattos to produce adequate supporting documentation--was clearly insufficient for conviction, and the jury's verdict must be set aside. This Court must agree to hear this case in order to preserve the principle that the government bears the burden of proof and the defendant is under no obligation to supply evidence to prove his innocence.

CONCLUSION

For the foregoing reasons, the Petitioner, Joyce Covatto, respectfully requests this Court to grant this petition and issue a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,

_____

Joyce M. Covatto
1545 West 38th Street
P.O. Box 3368
Erie, PA 16509
(814) 868-4821

Pro Se

88-1908

Supreme Court, U.S.
FILED
APR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

THE UNITED STATES,

Respondent,

v.

ALFRED D. COVATTO,

and

JOYCE M. COVATTO,

Petitioners.

WRIT OF CERTIORARI
TO THE THIRD CIRCUIT COURT OF APPEALS

APPENDIX

Joyce M. Covatto
1545 West 38th Street
Post Office Box 3368
Erie, PA 16508
(814) 868-4821

Pro Se

3758

TABLE OF CONTENTS

Document	Page
Decision of the Third Circuit	A-1
Judgment of the Third Circuit	A-22
Denial of Petition for Rehearing . . .	A-24
National Bancoporation and First United National Bank v. Covatto	A-26

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3550
NO. 88-3617

THE UNITED STATES
v.
ALFRED D. COVATTO and
JOYCE M. COVATTO,

Appellants

Appeal from the Judgment of the
United States District Court for the
Western District of Pennsylvania
(D.C. Crim. No. 87-7 E)

District Judge: Honorable Glenn E. Mencer

Submitted Under Third Circuit Rule 12(6)
January 24, 1989

BEFORE: GIBBONS, Chief Judge, SEITZ, and GREENBERG, Circuit Judges.

(Filed: JAN 26, 1989)

MEMORANDUM OPINION OF THE COURT

SEITZ, Circuit Judge.

Appellants Alfred D. Covatto and Joyce M. Covatto appeal the judgment of sentence of the district court. The district court had jurisdiction under 28 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

I.

Alfred Covatto was one of the founders and the Chief Executive Officer of National Bancorporation (NBC). NBC had three subsidiaries, including First United Marketing Services Inc. (FUMS), which provided telemarketing services to banks to generate credit card accounts. Joyce Covatto, Alfred Covatto's wife, was a senior vice president of NBC in charge of the operation of FUMS.

In January 1984, NBC and its subsidiaries were purchased by and became a subsidiary of the First National Bank of Fryburg, Pennsylvania (later named First United National Bank of Fryburg, Pennsylvania

(FUNB)). Alfred Covatto was retained as the Chief Executive Officer of NBC, and Joyce Covatto continued to head FUMS.

The government alleged in the indictment and sought to prove at trial that after FUNB purchased NBC, the Covattos executed a scheme to defraud FUNB and aided and abetted the commission of this crime in three ways: (1) they caused FUNB to pay approximately $20,809 to Kim Mallin, the babysitter of the Covattos' children, by representing on NBC's records that NBC employed Mallin as a clerk, (2) Alfred Covatto caused FUNB to pay eleven checks, drawn on NBC accounts and issued to Covatto and others, in order to pay Alfred Covatto's personal expenses, and (3) they caused FUNB to pay three invoices, totalling over $151,000, as advances for work FUMS never performed for one of its customers, Marine Midland Bank, in violation of 18

U.S.C. §§ 1344 and 2 (Count One).

The government also sought to show that Alfred Covatto misapplied FUNB funds by causing FUNB to issue the eleven checks for Alfred Covatto's personal expenses, in violation of 18 U.S.C. § 565 (Counts 2-12). Finally, the government sought to show that Alfred Covatto misapplied FUNB funds by causing FUNB to pay the Covattos' babysitting expenses, in violation of 18 U.S.C. § 656, and that Joyce Covatto aided and abetted Alfred Covatto in the commission of this offense, in violation of 18 U.S.C. § 2 (Counts 14-49).[1]

Appellant's first trial ended in a mistrial when the jury could not reach a unanimous verdict. Following the second jury

---

[1] Count 13, which alleged the misapplication of FUNB funds with respect to the issuance of one check to the Covattos' babysitter, was dismissed on appellants' motion prior to trial.

trial, appellants were convicted of Count One (the scheme to defraud) and Counts 14-47 (aiding and abetting and the misapplication of FUNB funds to pay the Covattos' babysitter). Alfred Covatto also was convicted of Counts 2, 3, 4, 8, 9, 11, 12 regarding the misapplication of FUNB funds in the issuance of seven checks to either himself or others. Appellants were sentenced and then took separate appeals. Alfred Covatto's appeal, at 88-3617, was consolidated with Joyce Covatto's appeal, at 88-3550.

II.

Appellants raise several issues in these appeals. First, appellants contend the district court erred in allowing the government to introduce evidence of Alfred Covatto's transactions with and disbursements of checks to third parties. Second, they raise the issue of prosecutorial misconduct during the

trial. In particular, Joyce Covatto argues that the district court erred in denying appellants' motion for a mistrial after the prosecutor elicited testimony from a director of the Office of the Comptroller of the Currency that he had "referred [this] matter to the authorities." Alfred Covatto contends that the prosecutor engaged in several acts of misconduct throughout the trial and in his closing argument. Finally, both appellants contend that there was insufficient evidence to support conviction.

A. Transactions With and Disbursements to Third Parties

Appellants contend that the district court erred in denying their motion to exclude evidence of Alfred Covatto's transactions with certain third parties, in violation of Fed.R.Evid. 402, 403, 404(b). We review the district court's decision to admit

this evidence under an abuse of discretion standard. United State v. Scarfo, 850 F.2d 1015, 1021 (3d Cir. 1988).

The evidence reveals that when FUNB purchased NBC in 1984, NBC owed Alfred Covatto $48,000 in "accrued compensation" or income Covatto had earned but not taken. FUNB paid Alfred Covatto $10,000 at the time of the purchase, but Covatto agreed to defer compensation of the remaining $38,000. After FUNB purchased NBC, Alfred Covatto wrote eleven checks on NBC's accounts, either to himself or to other persons. He claimed at trial that these checks represented part of the accrued compensation to which he was entitled.

The government was allowed to introduce evidence of the identity of the individuals to whom, and the purposes for which, the checks were written, including evidence that

appellant wrote checks either to James Willman or Cheryl Willman in order to persuade James Willman, an employee at Marine Midland Bank, to continue doing business with NBC.

Appellants argue that this evidence was inadmissible under Fed.R.Evid. 402 and 403 because it constituted Fed.R.Evid. 404(b) evidence of other crimes, particularly corporate bribery, which was highly prejudicial and not probative of any of the elements of the crimes charged in the indictment. They contend that the only issue at trial with respect to the eleven checks was whether Alfred Covatto justly believed he was entitled to issue the checks as part of his accrued compensation. Therefore, they urge that the way in which the funds were ultimately disbursed or used and Alfred Covatto's motive for disbursing the funds were irrelevant, citing Matters v. United States,

244 F. 736 (8th Cir. 1917). They also contend that the evidence of corporate bribery was prejudicial because it allowed the jury to convict appellants based on how the funds were used rather than on whether appellant was entitled to the funds as part of his accrued compensation.

The district court admitted the evidence to prove motive and/or part of the overall scheme to defraud alleged in the indictment. We conclude that the district court did not abuse its discretion in admitting the evidence and that the evidence satisfies the test of Fed.R.Evid. 403. The evidence, while prejudicial, was probative of the issue whether Alfred Covatto issued the checks intending in good faith that they be part payment of his deferred compensation or whether he instead issued the checks for some purpose other than satisfying the outstanding

deferred compensation. The high probative value of the evidence is indicated by the fact that the jury acquitted Alfred Covatto of misapplying FUNB funds on counts involving checks which were written to himself and were inscribed with memoranda that the checks were used for deferred compensation and convicted appellant of counts involving checks which were written to third parties and were inscribed with memoranda indicating their use for some purpose other than deferred compensation.

B. Prosecutorial Misconduct

1. The Motion for Mistrial

Appellants contend that the district court erred in denying appellants' motion for a mistrial after the prosecutor elicited testimony from David Hammaker, a regional director of the Comptroller of the Currency, that after conducting an examination of FUNB

in September 1985 he "referred the matter to the authorities." The district court had instructed the prosecutor only minutes earlier not to refer to the fact that Hammaker had made a referral to criminal authorities. We review the district court's denial of a motion for a mistrial under the abuse of discretion standard. United States v. De Rosa, 548 F.2d 464, 473 (3d Cir. 1977). In considering whether the district court should have granted the motion, we focus on the possibility of prejudice to the defendant. Id.

After reviewing the entire transcript of this trial, particularly considering the content of the testimony and the context in which it arose, we conclude the district court did not abuse its discretion in denying the motion. Although we do not condone the prosecutor's careless conduct, based on our

review of the record, we disagree with Joyce Covatto that this testimony left the jury with no other conclusion than that Hammaker believed appellants had committed a criminal offense.

2. Other Prosecutorial Misconduct

Alfred Covatto contends that the prosecutor's misconduct in this case was so pervasive as to deny Covatto a fair trial. In particular, he contends that the prosecutor overemphasized the bribery evidence, spoke so loudly at sidebar conferences that the jury overheard, mischaracterized evidence and made improper arguments to the jury.

We will assume that appellant preserved this issue for appeal. In evaluating the prosecutor's conduct, we must decide "'whether [his] remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights.'"

United States v. Adams, 759 F.2d 1099, 1111 (3d Cir. 1985) (citation omitted).

After reviewing the entire transcript, we conclude that the prosecutor's conduct, while certainly less than praiseworthy, was not so improper as to warrant reversal of appellants' conviction. We cannot discern from the record that the jury overheard the prosecutor's comments at sidebar conferences, and both the prosecutor and the court informed the jury that the prosecutor's comments were not evidence in the case. Appellant cites to many portions of the transcript for instances of prosecutorial misconduct during the trial. After reviewing the trial transcript, we are satisfied that the instances of alleged prosecutorial misconduct were not sufficiently prejudicial that they violated the right to due process.

C. Sufficiency of the Evidence

Appellants contend that there was insufficient evidence to support their convictions. Our standard of review requires us to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Skulsky, 786 F.2d 558, 563 (2d Cir. 1986). This standard is identical to that applied by the district court in ruling on a motion for judgment of acquittal. United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987). Accordingly, our scope of review is plenary.

In order to prove a violation of 18 U.S.C. § 1344, the government must show that the defendant knowingly (1) engaged in a scheme to defraud a federally insured financial institution, or (2) participated in a scheme to obtain money under the custody or

control of the financial institution by means of false statements or representations. United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987). "Scheme" is defined to include "any plan, pattern or cause of action, including false and fraudulent pretenses and misrepresentation, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived"; "fraud" is measured by determining whether the scheme "demonstrated a departure from fundamental honesty, oral uprightness, or fair play and candid dealings in the general life of the community." Id. at 624.

In order to prove a violation of 18 U.S.C. § 656, the government must show: (1) the bank was national in character, (2) the defendant was an officer of the bank, (3) the defendant willfully misapplied bank funds, credits, or moneys, and (4) the defendant

acted with intent to defraud the bank. United States v. Thomas, 610 F.2d 1166, 1174 (3d Cir. 1979). Intent to defraud exists if the officer acts "knowingly and if the natural result of his conduct would be to injure and defraud the bank even though this may not have been his motive;" such intent may be inferred from the facts and circumstances shown at trial and is basically a fact for the jury. Id. The element of misapplication requires proof of conversion of bank funds, credits or moneys. Id.

In order to prove a violation of 18 U.S.C. §§ 2 and 656 on Joyce Covatto's part, the government had to show that the substantive offense of misapplication occurred and that Joyce Covatto intentionally facilitated the violation of 18 U.S.C. § 656. See United States v. Cades, 495 F.2d 1166, 1168 (3d Cir. 1974).

The government's evidence tended to show: (1) Mallin, the Covattos' babysitter, was on [sic] listed on NBC's records and payroll as a clerk, but never did any clerical work for NBC, (2) Alfred Covatto told Mallin she was a "domestic investigator;" upon Mallin's request for a raise, Joyce Covatto told Mallin she might have to learn some function at the bank in case FUNB inquired about the reason for the raise, (3) aside from former members of NBC's Board of Directors, no one at FUNB, including its chief executive officer, knew that Mallin was being paid to watch the Covattos' children, (4) Alfred Covatto drew two checks on NBC accounts to pay the college tuition of Cheryl Tillman, with no indication that they were part of accrued compensation, (5) Alfred Covatto drew one check on an NBC account in order to purchase a truck for James Willman,

indicating on the check that it was for "truck purchase," (6) Alfred Covatto drew three checks on NBC accounts to pay William Trice a commission for obtaining loans which he did not obtain, (7) someone from NBC drew up a list of all payments constituting repayment of Alfred Covatto's accrued compensation, which included the aforementioned checks, but there is no evidence as to when this list was created, and FUNB received a copy of the list only after it began its audit of NBC, (8) NBC, through FUMS, submitted three invoices to its customer Marine Midland Bank for an advance for telemarketing and other services which were not described in the invoices, (9) pursuant to an established procedure, FUNB credited NBC accounts in the amounts of the invoices to be reimbursed by Marine Midland Bank once NBC had completed the work, (10) Marine Midland

never paid FUNB in the amount of the invoices, and the work was never completed, (11) documentation to support payment of the invoices could not be found in Marine Midland's records or in FUMS' records, and the Covattos were unable to supply documentation for the invoices upon request, (12) Alfred Covatto told an investigator from the Federal Bureau of Investigation that he could supply the documentation from the invoices but did not do so, (13) Alfred Covatto indicated he would cover one of the invoices, in the amount of $60,000, with a check from an account in Florida, but monies from the Florida account were deposited into NBC's account and never credited to FUNB to cover the invoice, (13) the Covattos were ultimately responsible for the invoices since Alfred Covatto was the president of NBC and Joyce Covatto was in charge of FUMS.

We conclude that the government's evidence, while circumstantial, was sufficient to allow a rational trier of fact to find the elements of the crimes charged beyond a reasonable doubt.

III.

In light of the foregoing, we will affirm the judgment of the district court.

To the Clerk of the Court:

Please file the foregoing memorandum opinion.

s/s
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3550
NO. 88-3617

THE UNITED STATES

v.

ALFRED D. COVATTO and
JOYCE M. COVATTO,

Appellants

Appeal from the Judgment of the
United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 87-7 E)

BEFORE: GIBBONS, Chief Judge, SEITZ, and GREENBERG, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and

was submitted under Third Circuit Rule 12(6) on January 24, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the district court entered on August 15, 1987 and September 7, 1987 be and the same are hereby affirmed.

ATTEST:

s/s
Clerk

JAN 26, 1989

Nos. 88-3550 & 88-3617

Certified as a true copy and issued in lieu of a formal mandate on March 1, 1989.

Test: s/s

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3550
NO. 88-3617

THE UNITED STATES

v.

ALFRED D. COVATTO and
JOYCE M. COVATTO,

Appellants

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 87-7 E)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, Circuit Judges.

The petitions for rehearing filed by Joyce M. Covatto, appellant in No. 88-3550 and Alfred D. Covatto, appellant in No. 88-3617, in the above captioned matters having been submitted to the judges who participated

in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court

DATED: FEB 21 1989

s/s
Circuit Judge

BIANCHI SELIGSON LINCOLN MERCURY, INC., Plaintiff	:	IN THE COURT OF COMMON PLEAS
V.	:	OF ERIE COUNTY, PENNSYLVANIA
NATIONAL BANCORPORATION and FIRST UNITED NATIONAL BANK,	:	CIVIL ACTION-LAW
V.	:	
ALFRED COVATTO, Additional Defendant:	:	NO. 670-A-1986

O P I N I O N

Joyce, J., November 9, 1988

This matter is before the Court for a determination of issues incident to the Complaint against Additional Defendant filed by National Bancorporation and First United National Bank, Defendants, for breach of contract relating to the lease and use by Additional Defendant, Alfred D. Covatto, of a 1984 Lincoln Town Car automobile during his employment under contract with Defendants.

The principle issue faced by the Court

in this action concerns the authority of Additional Defendant, Alfred D. Covatto ("Covatto"), to enter into a vehicle lease agreement with Plaintiff.

Covatto originally, with his wife, owned 100% of the outstanding stock of National Bancorporation ("National") and held the position of Chief Executive Officer. Covatto caused to be executed between himself and National an Executive Employment Agreement for purposes of securing and defining his employment status, including recitations of duties and benefits involved in the position of Chief Executive Officer. Upon the subsequent acquisition of the 100% of the common stock of National by First United National Bank ("First"), the Board of Directors of First executed a ratification agreement between itself and Covatto ratifying the aforementioned Executive Employment Agreement. Of

particular interest in this instant action is paragraph number 8 entitled "Vacation and Other Matters" (page 6, Executive Employment Agreement), subparagraph 2 stating "[e]mployee shall be entitled to a new automobile each third year (Lincoln or equivalent) . . . ."

At the time of the acquisition, Covatto was leasing a 1982 Lincoln through one of his corporations, but not through the acquired National. This lease was between Plaintiff and a corporation unrelated to the corporate acquisition underlying the instant action. As such, its existence has no bearing on the present controversy. As a direct result of this finding, the Court must conclude that the leasing by Covatto of the 1984 Lincoln was the first leasing of a "Lincoln or equivalent" under the ratified Executive Employment Agreement. This agreement clearly

sets forth the right of Covatto to such an automobile with the only exception being that this right is exercisable once every three years. Since this Court finds that the 1984 lease was the first such lease under the new agreement, the court is compelled to further find that this lease is expressly authorized by the agreement. The clear and unambiguous language is unassailable. Webster's Third New International Dictionary defines 'entitled' as giving "a right or legal title to" and "[to] furnish with proper grounds for seeking or claiming something." Webster's Third New Int'l Dictionary 758 (3d ed. 1976). Covatto, by virtue of the language of his own instrument, creates in the court's opinion a situation whereby every three years First could have been legally compelled to provide Covatto with a new vehicle and to vest in him all rights and title to such vehicle to the

exclusion of all others, including First.

Given the foregoing, it is of no importance why Covatto turned in the 1982 Lincoln, rather it matters only that he did lease the 1984 Lincoln. This brings the court to the question of whether Covatto had the power by himself to execute the agreement to lease the vehicle or whether, despite his entitlement, it was upon the direction of the Board of Directors only that such a transaction should be effected.

Defendants, National and First, argue that Covatto was without authority to enter into the 1984 lease agreement on his own initiative and as a result, is liable to defendants for all amounts expended as a result of Covatto's use of this automobile.

Covatto's position as an employee of the newly acquired entity substantially parallels that of his executive status at the original

National Bancorporation. The duties and powers exercised in each of the two employment situations involved substantial control over ordinary and everyday business operations to the point that ultimate decisions concerning everyday business were within Covatto's control. These facts were repeatedly brought out during a hearing held September 28, 1988, on this matter and are a part of the permanent record.

Covatto himself could, therefore, execute any function that was within the lawful power of the board of directors subject only to the "ordinary course of business" standard. See, Renault v. L.N. Renault and Sons, 188 F.2d 317(3d Cir. 1951). In the present situation, it is undisputed that First was able to lease vehicles for its officers if it so desired. Testimony during the instant hearing established that employees of First

and National did travel from time to time on corporation business. It appears quite clearly to the Court that the lease, acquisition and use of an automobile may certainly be considered within the ordinary course of the business of a corporation having extensive ties to various businesses and localities at some distance from a corporate division's "home base". Further, it appears that this is the situation in the case at bar.

The fact that Covatto was given almost unrestrained control over his facet of the entire business operation by the Board of Directors from the moment of the acquisition of National by First, further requires the legal result that he must have assumed any and all powers with which the Board could have endowed him. An agent invested with substantial control over a business must have power available to him to preserve his prin-

cipal's interest. This result is only strengthened by the fact that Covatto appears to have been very actively involved in the operations of the business itself. It is axiomatic that the active, "front line" portion of any business, not the board of directors, must have the primary authority and responsibility for accomplishing the business of any corporation.

The extent to which an officer or employee of a corporation may extend his authority is inextricably tied to the facts of the surrounding situation. The instant matter, once again, presents us with the situation of an executive officer invested with almost plenary authority over an enterprise's operations. Covatto was also subject to an executive employment contract that stated clearly that he was "entitled" to a Lincoln or similar style automobile. This contract was

ratified by the acquiring corporation, First. Even further, the record clearly shows that First knew either directly, by virtue of the physical presence of new car, or constructively, by virtue of the accounting audit, that a new vehicle lease existed. Thus, the Court must conclude that either Covatto had direct authority through the Executive Employment Agreement and the extent of his control over operations or he had implied authority by virtue of the defendants not objecting to these actions once they became aware of them. In either case, the result is the same.

Defendants, in objecting to the characterization of Covatto as having implied authority by virtue of their inaction after becoming aware of the existence of the 1984 Lincoln, argues that although they knew of the change of automobiles they believe that

the 1984 Lincoln was merely a substituted vehicle under the 1982 lease. The court cannot accept this argument. Each of the Defendants is a financial services corporation involved to a significant degree in commercial lending. It is an integral part of their business to secure and protect their proprietary interest and this is done extensively by virtue of legal instruments. It would be unheard of for such an institution to swap collateral on one of their own loans without a corresponding swapping of legal instruments. Defendants cannot reasonably rely on the position that another entity involved extensively in the leasing of vehicles would permit any vehicle to leave their possession without the execution of a separate and unique security and lease agreement.

Based upon the above considerations,

this Court has no alternative but to hold for Additional Defendant, Alfred Covatto, and against original Defendants, National Bancorporation and First United National Bank.

BY THE COURT:

s/s
MICHAEL T. JOYCE, JUDGE

cc: Henry Ray Pope, III, Esq.
Richard A. Vendetti, Esq.